

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION Nos.3808 and 3809 of 2015

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COMMON ORDER :

The petitioners 1 to 4 herein in the two Criminal Petitions are accused Nos.1 to 4 in the private complaint i.e., CC No.394 of 2014, filed under Section 138 of N.I Act maintained by 1st respondent—complainant. In the case under N.I Act the procedure for trial is summary in nature as contemplated under Section 143 of N.I Act.

2) It is when the arguments of the case were in progress, to say the case almost at fag end to reserve for judgment, the complainant filed two applications i.e., CrI.M.P. No.512 and 513 of 2015 before the trial Court under Section 311 Cr.P.C to reopen the case for further examination of PW.1 and another to recall PW.1 and to receive and mark certain documents. It is after contest, the learned Magistrate allowed the same by common order dated 09.04.2015. Impugning the same, the present applications are filed under Section 482 Cr.P.C.

3) The contentions in the petitions impugning the order allowing the two applications by the trial Court are that the learned Magistrate failed to assign any reason in allowing the applications and even failed to consider why and on what grounds the petitioners could not file the documents earlier and what prevented them for filing the documents earlier but for at the fag end of the trial to allow and when it renders to fill up the gaps or lacuna that cannot be permitted by law, thereby the impugned order is unsustainable and liable to be set-aside.

4) The learned counsel for the petitioners placed reliance on the judgment dated 10.02.2012 of this Court in CrI.R.C No.206 of 2012, whereunder it is observed at para Nos.3 and 4 as follows:

3. Section 311 Cr.P.C reads “Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case.”

4. The power given under the first part is entirely discretionary. It should of course be exercised judicially. The last part of the section is mandatory. If the court finds that recalling of a witness is essential to the just and proper decision of the case, it is obligations to admit it at any stage of the proceeding. Petitioner failed to furnish reasons for recalling P.Ws.1 and 2 for one and half years after their examination.

5) A perusal of Section 311 Cr.P.C clearly speaks there is discretionary power of the Court, which is also under Section 165 of Evidence Act, when both the provisions read combinedly to understand the scope, any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned, as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

6) A reading of the above provision makes it abundantly clear that it is running in two parts, so far as the 2nd part of Section 311 of Cr.P.C concerned, what is mandatory for the Court to summon and

examination by use of the word 'shall', as if his evidence appears to it to be essential to the just decision of the case. It is nothing but akin to Order 41 Rule 27 (1) (b) C.P.C and akin to the power under Section 391 Cr.P.C of the appellate jurisdiction in civil and Criminal cases respectively. So far as the 1st limb of Section 311 of Cr.P.C concerned, the Court may summon any person as a witness or examine a person in attendance or recall or re-examine a person already examined, at its discretion. No doubt, even at the instance of authority provided to exercise the judicial discretion, the authority has to assign reasons for filing such application and to show the grounds to entertain or allow to permit examination of additional witness or recall and re-examination of witness already examined with reference to receiving of documents, if any.

7) A perusal of the impugned order followed by the petition and counter contest before the trial Court shows that during the course of arguments, accused raised the contention that no document filed by the complainant company to say that it was a registered company, the prosecution is not sustainable and as an abundant caution the documents are proposed to be filed to show that it is a registered company.

8) No doubt, merely on a contention raised by an accused in the course of arguments, the complainant or other party as the case may be cannot be permitted to fill up the lacuna for allowing the application and merely because it is sought for in the first limb of Section 311 Cr.P.C referred supra, the law is fairly well settled in this regard.

9) When such is the case, coming to the second limb of Section 311 Cr.P.C of any essentiality for any just decision of the case for the Court to receive within its power thereunder read with Section 165 of

Evidence Act; a perusal of PW.1's evidence on record before the trial Court that is drawn attention of the Court in the course of hearing by one of the counsel, makes it clear that there is no any even specific suggestion of non- registration of the company much less any whisper in the deposition of A4-DW1, to say it is an unregistered company and the prosecution thereby is not sustainable under Section 138 r/w 142 of N.I Act. As such from the undisputed evidence on the proof of the fact, for arguments sake even contended as an unregistered company, that does not enable the Court to permit PW1's recall for leading further evidence as not essential for just decision of the case that too when the petitioner has not assigned any reason to file such document, but for to say since respondent in the course of hearing raised the argument, filed as an abundant caution but not as an essential requirement.

10) Having regard to the observation surpa, the petitions are allowed and the order is set aside. Needless to say the contention of the accused that the company is an unregistered one does not survive for no evidence or other material to support that contention.

11) As a sequel, miscellaneous petitions, if any filed in this Criminal Petition, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:03.06.2015

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HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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